Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

No. 214—October Term, 1962

(Argued January 21, 1963 Decided March 1, 1963)

Docket No. 27701

PETER F. DAMANTI,

Plaintiff

v.

A/S INGER,

Defendant Third-Party Plaintiff-Appellant-Cross-Appellee

v.

DANIELS & KENNEDY, INC.,

Third-Party Defendant Appellee-Cross-Appellant

v.

ILLINOIS ATLANTIC CORP.,

Third-Party Defendant-Appellee

Before:

FRIENDLY, SMITH and MARSHALL, *Circuit Judges*.

Appeal in third party proceeding in the admiralty in the Eastern District of New York, from judgment setting

aside verdict on special interrogatories, and granting new trial, and from dismissal of third party complaint and a claim over on a second trial, Walter Bruchhausen and Matthew T. Abruzzo, District Judges.

Reversed and remanded for entry of judgment for third party plaintiff A/S Inger.

MONROE J. CAHN, New York, N. Y. (Pyne, Smith & Wilson, New York, N. Y., on the brief) *for A/S Inger.*

RAYMOND C. GREEN, New York, N. Y. (Joseph M. Soviero, Harry Schechter and Harold Klein, New York, N. Y., on the brief) *for Daniels & Kennedy, Inc.*

DAVID P. H. WATSON, New York, N. Y. (Haight, Gardner, Poor & Havens, and J. Ward O'Neill, New York, N. Y., on the brief) *for Illinois Atlantic Corp.*

SMITH, *Circuit Judge*:

On October 27, 1955, Damanti, a longshoreman in the employ of a stevedore, Daniels & Kennedy, Inc., was injured while moving a hatch cover beam with a beam jack supplied by the ship on defendant A/S Inger's vessel Elin Hope, time chartered to Illinois Atlantic Corp. Damanti brought action in the United States District Court for the Eastern District of New York against Inger alleging negligence and unseaworthiness. Inger brought in as third party defendants Daniels & Kennedy and Illinois Atlantic, each of whom also cross claimed against the other.

The case went to trial on May 13, 1957 before Judge Bruchhausen and a jury. On May 24, 1957, when summations of counsel were about to begin, defendant Inger settled with plaintiff for $30,000, first offering the third party defendants an opportunity to take over the defense, which they declined. Inger's counsel testified as to the reasonableness of the settlement. The claims over were then submitted to the jury on special interrogatories which were answered as follows:

"(A)—Settlement With Plaintiff

1. Was the payment of the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes.

2. If no, was the payment plainly erroneous? (not answered).

3. If yes, was it plainly erroneous as to amount? No. As to liability? Yes.

4. Is it possible that you would have found the shipowner liable? For negligence? No. For unseaworthiness? No.

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered). For negligence? For unseaworthiness?

(B)—Indemnity Claim

1. Were the agents, servants, or employees of the stevedoring contractor negligent or careless in any way? Yes.

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes.

3. If yes, what was the nature of such negligence? Carelessness.

4. (a) Was the ship or its equipment unseaworthy at 8:00 o'clock a. m. on October 27, 1955? No.

(b) Was the ship or its equipment unseaworthy at the time of the accident? No.

5. Was the shipowner negligent? No.

6. If yes, what did that negligence consist of? (not answered)."

On motion (including one in the alternative by Inger) the court set the special verdict aside and ordered a new trial. Thereafter all parties waived a jury and retrial on the claims over was had before Judge Abruzzo on the record of the first trial, again supplemented by testimony of Inger's counsel as to the reasonableness of the settlement.

The Court dismissed Inger's third party complaints against Daniels & Kennedy and Illinois Atlantic, as well as the cross complaints of the latter two parties against each other. Inger appeals from the denial of its motion for a directed verdict against Daniels & Kennedy on the first trial and from the judgment dismissing its complaint against Daniels & Kennedy in the second trial. Daniels & Kennedy appeals from the grant of a new trial at the first trial and from the dismissal of the complaint against Illinois Atlantic in the second trial as a precautionary measure in case the appeal of Inger is successful. Daniels & Kennedy also appeals from the denials of its motions at the first trial for a directed verdict and for judgment on the jury's special verdict. We find error on Inger's appeal in the failure to enter judgment for Inger against Daniels & Kennedy on the special verdict of the jury. While this

disposes of the matter, we would be required if we reached the question also to find error in the dismissal of Inger's claim against Daniels & Kennedy on the second trial. We therefore reverse and remand for judgment in favor of Inger against Daniels & Kennedy. We find no error in dismissal of Daniels & Kennedy's cross-complaint against Illinois Atlantic. No appeal was taken from the dismissal of Inger's claim against Illinois Atlantic.

A ship may recover over against a stevedore for amounts paid in settlement of a personal injury claim if the injury was caused by breach of the stevedore's warranty of workmanlike service. *Waterman SS Corp.* v. *Dugan & McNamara Inc.*, 364 U. S. 421 (1960); *Shannon* v. *United States*, 235 F. 2d 457 (2 Cir. 1956); *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753 (9 Cir. 1956), cert. denied 352 U. S. 926; *Ellcberg* v. *Pacific Far East Line Inc.*, 167 F. Supp. 3 (N.D. Cal. 1958).

The elements the ship must establish to recover indemnity from the stevedore are first that the settlement was reasonable under all the circumstances and second that the stevedore was guilty of a breach of the warranty of workmanlike service and has no defense against the ship's indemnity claim. The ship need not establish that it was in fact liable to the claimant so long as the claimant's injury on the ship and a potential liability on the facts known to the ship are shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the ship. "It (RK) was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employer's Liability Act, it cannot be said that the plaintiff made other than a fair and reasonable settlement of its potential

liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances." *Chicago, Rock Island & Pac. Ruy. Co.* v. *United States*, 220 F. 2d 939, 941 (7 Cir. 1955) reversing the dismissal of an action for indemnity on a finding that the railroad had not been negligent and therefore was not liable to its employee. *Hankinson* v. *Penn. RR Co.*, 280 F. 2d 249, 252 (3 Cir. 1960); *California S & B Co.* v. *Pan-Atlantic SS Corp.*, 291 F. 2d 252, 254 (9 Cir. 1961); *Lilleberg* v. *Pacific Far East Line Inc.*, *supra*.

There was testimony in the case at bar that the injured longshoreman was 37 years old, with a life expectancy of approximately 34.76 years, earning $6,000 a year as a longshoreman, that he suffered a herniated intervertebral disc at L5-S1 (fifth lumbar vertebra-sacrum) or at L4-L5 (fourth-fifth lumbar vertebrae) and a compressed fracture of L3 (third lumbar vertebra), permanent injuries disabling him from heavy work, reducing his earning capacity by about $4,000 a year. In addition there were fractures of transverse processes at L2, 3 and 4 (second, third and fourth lumbar vertebrae), one of which had failed to reunite. He sought damages in the amount of $100,000.

On the liability of the shipowner, there was evidence that the beam jack was defective, in that it was rusted, pitted, bent and with its beam holding teeth imperfect, that these defects caused it to slip off the beam and cause plaintiff and the jack to fall into the hold. Two apparently workable beam jacks were produced at the trial, but a possible inference from the evidence was that the shipowner had concealed and failed to produce the jack involved in the mishap. There was therefore ample support for the jury's answer that the payment of $30,000 in settlement was a reasonable compromise, even though the jury itself believed that it would have credited the evidence against the ship's liability. The court on both trials appears to have ruled as it did in the belief that the determination of

no liability on the part of the ship bars recovery over. This, as we have seen is erroneous, for potential liability is all that is required. Judge Bruchhausen's decision to grant a new trial was based on an erroneous view that the jury's verdict was the product of confusion. It appears to us, however, perfectly clear and consistent, and the court's contrary conclusion and action in setting it aside based on the erroneous legal premise that Inger must prove that it was liable in fact. His action in so doing is reviewable on the appeal from the judgment on the second trial. 6 Moore, Federal Practice 3896-97. *Pettingill* v. *Fuller*, 107 F. 2d 933 (2 Cir. 1939), cert. denied 309 U. S. 669. The jury's answers are quite consistent with the proper understanding of the rule, for even though it found no liability on the part of Inger, it found in all the circumstances, including testimony as to potential liability, that the settlement was reasonable. On the second trial, Judge Abruzzo found that Inger was not reasonable in making the settlement. To what exent, if at all, the finding may have been influenced by a view that a finding of no liability on the part of the ship precluded recovery over is not clear. A review of the entire record, however, leaves us with the firm conviction that the finding is incorrect. We hold it clearly erroneous. Since the action was tried to the court and the finding was largely based on the record of the first trial, we are free to make a finding on the issue from the same record, *see Gedeman* v. *Anheuser Busch, Inc.*, 299 F. 2d 537, 547 (2 Cir. 1961) and cases cited; *Ezekiel* v. *Volusia SS Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. denied sub nom. *Pinto* v. *States Marine Corp.*, 369 U. S. 843. We hold that the settlement was reasonable in amount.

The other element required for recovery is breach of the stevedore's warranty. Both the jury and Judge Abruzzo found that negligence of the stevedore caused the injury. This was a breach of the warranty of workmanlike service. *Drago* v. *A. S. Inger*, 305 F. 2d 139 (2 Cir. 1962), cert. denied

U. S.—(a case involving the same parties except for a different plaintiff). It is probable that the negligence of the stevedore found by both triers was based solely on the actions of the injured longshoreman. This, however, does not preclude recovery over by the shipowner, but is simply a factor that would reduce the recovery of the injured plaintiff from him, *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, 408-9, and thus is to be considered only in determining the reasonableness of the settlement.

Inger is entitled to judgment for the amount of the settlement. It is also entitled to reasonable attorneys' fees and expenses in the defense of the action up to the time of the settlement. *Baliaga* v. *Luckenbach SS Co.*, 301 F. 2d 403, 409 (2 Cir. 1962).

The Longshoremen's and Harbor Workers Act, 33 U. S. C. § 901 *et seq.* does not bar recovery over, which is based on damage from breach of the stevedore's warranty, not on the longshoreman's claim against his employer. *Ryan Stevedoring Corp.* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124 (1958).

Here, as in *Drago*, "There is no substance in the appeal by Daniels & Kennedy, Inc., from the dismissal of its cross-claim against Illinois Atlantic Corp." *Drago* v. *A S Inger*, *supra*, at 143.

The judgment is reversed and the cause remanded to the District Court with instructions to enter judgment in favor of A S Inger against Daniels & Kennedy in the amount of the settlement plus reasonable attorneys' fees and expenses incurred in defense of the action up to the time of the settlement. Dismissal of Daniels & Kennedy's cross-claim against Illinois Atlantic Corp. is affirmed.

Opinion of Judge Abruzzo.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

PETER F. DAMANTI,

Plaintiff,

v.

A. S. INGER,

Defendant and
Third-Party Plaintiff,

v.

DANIELS & KENNEDY, INC., and
ILLINOIS ATLANTIC CORP.,

Third-Party Defendants.

Civil Action
No. 16455

May 9, 1962

Pyne, Smith & Wilson, Attorneys for Defendant and Third-Party Plaintiff, A. S. Inger; Monroe A. Cairns of Counsel.

Joseph M. Soviero, Attorney for Third-Party Defendant, Daniels & Kennedy, Inc.; Raymond C. Green, of Counsel; and

Shatzkin & Cooper, attorneys for Daniels & Kennedy; Burton S. Cooper, of Counsel.

Haight, Gardner, Poor & Havens, Attorneys for Third-Party Defendant, Illinois Atlantic Corp.; David B. H. Watson, of Counsel.

Abruzzo, D. J.

This action was instituted by the plaintiff, Peter F. Damanti, a longshoreman employed by Daniels & Kennedy, Inc., to recover $100,000 damages for personal injuries sustained on October 27, 1955, while working on board the Ellx Horf, a vessel owned by the defendant A/S Inger, because of the alleged negligence of the defendant and the alleged unseaworthiness of the vessel. Inger impleaded Daniels & Kennedy, Inc., plaintiff's employer, and Illinois Atlantic Corp., time charterer of the vessel, as third-party defendants, seeking indemnity from either or both to the full extent of its liability to the plaintiff, if any.

Illinois Atlantic was an affiliate of the Daily News Syndicate, Inc., publisher of the New York Daily News, a newspaper. Illinois Atlantic had a contract of affreightment with the Quebec North Shore Paper Company of Baie Comeau, Quebec, Canada, from whom the Daily News was procuring its newsprint. Illinois Atlantic as time charterer of the Ellx Horf provided the transportation facilities for bringing the newsprint from Baie Comeau to the Daily News' dock at the foot of Dykeman Street, Brooklyn. The paper was loaded at Baie Comeau by Quebec North Shore Paper Company and unloaded by Daniels & Kennedy, stevedores and plaintiff's employer, under the terms of a contract with the Daily News.

The gist or theory of plaintiff's action against Inger was that one of the beam jacks supplied and owned by the vessel, and part of the ship's gear or equipment, was defective. Inger's defense was that the beam jack was in good condition before and after the accident and that the plaintiff's injuries resulted from his misuse of the jack.

The action was originally tried before Judge Bruchhausen and a jury, and testimony relating to the cause of the accident and medical testimony pertaining to plaintiff's injuries was adduced. After all parties had rested and,

just prior to summation, Inger's counsel summoned counsel for both third-party defendants into Judge Bruchhausen's chambers. There he advised them for the first time that he had offered to settle the case as between Inger and the plaintiff for $30,000 and offered them the further defense of plaintiff's action. They refused to join in the settlement or to undertake the further defense of the action. Notwithstanding the refusal of the third-party defendants, Inger settled the action with the plaintiff and Inger's counsel then took the stand and explained to the jury his reasons for settling plaintiff's action, testifying that on the evidence adduced the jury could find that the beam jack was defective even though the defendant produced witnesses who testified the jack was in no way defective.

The question of liability over was submitted to the jury by way of special interrogatories prepared by the Court. The questions and the jury's answers are as follows:

SPECIAL VERDICT

(A)—Settlement With Plaintiff

1. Was the payment by the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes

2. If no, was the payment plainly erroneous? (not answered)

3. If yes, was it plainly erroneous as to amount? No

As to liability? Yes

4. Is it possible that you would have found the shipowner liable?

For negligence? No For unseaworthiness? No

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered)

For negligence? For unseaworthiness?

(B)—Indemnity Claim

1. Were the agents, servants or employees of the stevedoring contractor negligent or careless in any way? Yes

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes

3. If yes, what was the nature of such negligence? Carelessness

4. (a) Was the ship or its equipment unseaworthy at 8:00 o'clock a.m. on October 27, 1955? No.

(b) Was the ship or its equipment unseaworthy at the time of the accident? No

5. Was the shipowner negligent? No

6. If yes, what did that negligence consist of? (not answered)

Inger moved to set the verdict aside and its application was granted. Judge Bruchhausen's opinion is reported in 153 Supp. 400.

Judge Bruchhausen in setting aside the jury verdict held that the jury's answers to the questions propounded did not exactly demonstrate that the jury was guided by principle in that it decided that $30,000 was a reasonable compromise but failed to answer the interrogatory as to whether the payment was plainly erroneous, and then determined that the $30,000 was not plainly erroneous as to amount but plainly erroneous as to liability. In his opin-

ion, Judge Bruchhausen said that if not for the settlement the jury could conceivably have awarded the plaintiff a substantial sum of money on the original claim, if that had been left for determination. He held also that the jurors' answers to both parts of question 4, while not conclusive, was an indication as to the jurors' lack of due consideration when added to other inconsistencies. He held further that the general subject of indemnity over was complex and the jury could have been readily confused and that, therefore, a clear and thorough presentation of the matters referred to in the opinion would aid both the Court and a jury in their determination on a retrial of the issue of liability over.

The action based on the third-party claim of liability over was retried to this Court without a jury and it was stipulated that the retrial be based on the testimony of the first trial. Defendant's counsel is also seeking Inger's legal expenses and counsel fees paid in defending the action.

TESTIMONY

The testimony adduced by the plaintiff was that the ELIX HOPE arrived at the Daily News' pier at the foot of Dykeman Street, Brooklyn, New York, and at 8 a.m. on October 27, 1955, longshoremen employed by Daniels & Kennedy boarded the vessel to discharge her cargo of rolls of newsprint. There were six hatches aboard the vessel. Plaintiff was the hatch boss of the gang assigned to the No. 1 hatch. His gang first removed tarpaulins and hatch covers which lay atop five beams covering the hatch on the top deck of the vessel. They then removed the five beams which lay athwartship, side by side, across the hatch. Two beams described as queen beams and which were on the aft end of the hatch, each of which weighed approximately a ton, were first removed by bridles at-

tached to two winches, and the other three described as king beams were removed by the use of two beam jacks supplied by the vessel which the longshoreman gang found in a box at the aft end of hatch No. 1. Each jack was operated by a member of the gang at opposite sides of the hatch. Projections on the jacks which the plaintiff called lugs or lips firmly attached to a flat steel plate which extended from the jack were inserted into two holes on the beam. These two holes were the only place on the beam where the lugs or lips could be inserted. The plaintiff described the operation of the beam jack. The beam jack clamps were attached, locked and tightened; and a longshoreman lifted one side and his partner on the opposite side of the hatch then raised his side. The beams were lifted onto rollers which rolled along the coaming of the hatch and were then stored in the wings of the hatch. Plaintiff and his partner, Intaglia, were the operators of the jacks. They removed the beams atop the hatch on the top deck and then the longshoremen removed rolls of newsprint which lay on top of the beams covering the 'tween deck. After these rolls of newsprint were discharged, plaintiff and Intalgia proceeded to remove the 'tween deck beams in the same manner that they removed the top deck beams. The queen deck beams aft were removed by bridles and the two winches and then the plaintiff and Intaglia commenced removing the three remaining king beams. Plaintiff operated a jack on the port side of the hatch and Intaglia operated a jack on the starboard side.

Plaintiff testified that he inserted the lugs or lips into the beam holes, attached the clamp to the beam, and turned the thumb screw by hand to tighten the clamp as far as the screw would go. After he had it hand-tightened he got an object he used as a chock to further tighten the screw. After tightening it he shook the beam jack as a

test to determine if the clamps were tight, after which Intaglia raised his end about an inch. Plaintiff then picked up the jack handle to raise the beam and, as he did, he and the jack went flying into the hold onto the rolls of newsprint stored there. He fell about eight feet and was injured seriously.

Plaintiff and three members of his gang who testified for him at the trial stated that the beam jack's various parts were pitted and rusty and bent.

Plaintiff on direct examination testified that he did not know how the jacks got into the hold but on cross examination stated that he had his men lower them to the 'tween deck. He claimed that the clamps "seemed kind of short to fit around the beams" (Tr. 76). He also testified (Tr. 147):

> The Witness: I did notice these clamps here were pitted (indicating); sort of bent; and this thumb screw here—(indicating), looked bent to, me also, because it was rusted and very hard to turn the thumb screw.
>
> The handle might have been bent, too.

Plaintiff testified on cross examination that after he attached the clamp under the beam he could not see the bottom of the clamps, but he testified on recross examination that because the coaming at the 'tween deck hatch was only a few inches high, if he had any doubts in his mind as to whether the clamp was fastened to the beam he could, if he so desired, readily determine that by looking under the clamps and could also feel if they were fastened securely.

Intaglia, plaintiff's partner in the raising of the beam, testified that after he had lifted the beam about an inch or two and the plaintiff had raised his end up to the same he felt the beam jack slipped because the plaintiff had "pulled it" (Tr. 223). He picked the jack up but saw

nothing wrong with it. He laid it down and got a better view of the jack and saw that "its teeth" were bent, the metal through which the screw had been run was also bent, and the jack was rusted. He saw the third mate pick up the jack and "walk up the ladder."

Lucci, a member of plaintiff's gang, testified that he was a "header." He described the duty of a "header" as one who knocks down standing roll of newsprint so that pins could be inserted in the rolls to aid in their removal. He stated that he examined the jacks on the top deck prior to their being used and although he was under no obligation to do so he did this on his own accord as a safety precaution. He claimed "that is part of the job" (Tr. 418) and "we always check to make sure" (Tr. 420). He saw that the clamps were bent and rusted and the screw was very bent and hard to turn but he did not advise plaintiff of this. He testified further that at the time of the accident he was two or three feet from the plaintiff and saw the plaintiff connect the jack to the beam, raise the beam about an inch, and then saw him "flying" and fall with the jack into the hold. He testified that the plaintiff connected the beam to the jack in proper "shape" but that he did not flip the lock that locks the jack in place when it is in the socket (Tr. 439).

Agosto who worked as a signalman stationed on the top deck on the starboard or inshore side of the hatch saw both jacks after the accident and, although he had nothing to do with the jacks and it was not his job to inspect them he did, and saw that both were rusty and pitted and bent.

The testimony of Olson, the ship's carpenter, adduced on behalf of the defendant and third party plaintiff, Inger, was to the effect that it was his duty to take care of the Elin Hope's gear and equipment, but it was also the duty of the second and third mate together with one of the crewmen to see that the necessary equipment for unloading

was available and in good order and that two beam jacks were placed at each hatch. The carpenter testified that he always inspected, oiled, and greased the beam jacks before the vessel arrived in port in New York or Canada and, if necessary, he would repair the jacks and straighten the clamps. He described the manner in which he oiled or greased the jack by unscrewing a pin on the top of the jack and inserting oil and then screwing the pin back on again. He oiled all movable parts so that they would not rust. He moved the clamps up and down on the axle of the roller and then put the jacks in a case and put a case at each side of a hatch. He did this operation while the vessel was enroute from Quebec to Brooklyn.

The third mate Viken testified that he was informed of the accident to the plaintiff by the chief mate. He went to the No. 1 hatch and removed the jack which was laying on the port side of the hatch coaming just about where the third beam would be. He examined the jack on the deck and found the clamps in good condition and the screw moved easily. They were not pitted nor bent but were a little rusty, but this did not interfere with the operation of the jack. He brought the jack to the chief mate and they proceeded to the forecastle and placed it in a locker. The following day he removed it from the locker and brought it to the 'tween deck where he and the chief mate in the presence of one Daly, an independent marine investigator, examined and tested the jack. The third mate and the chief mate raised and lowered the beam, moved it back and forward, and the jack did not slip. He then put two paint marks on the jack where plaintiff had used and stored it in a locker. About a year later in the summer of 1956, he gave it to a man, who was not identified, who took it away. A jack was introduced and admitted in evidence at the first trial (Ex. F) but neither the third mate nor the chief mate could definitely identify it as being the one used by the plaintiff. Both stated that they were of the

opinion that it looked the same although there were no paint marks or paint strokes on it.

Krossoy, the chief mate, and Daly corroborated the third mate's testimony that there was nothing wrong with the jack and that on the day following the accident it worked properly.

None of the four witnesses who testified on behalf of Inger witnessed the accident. Inger's counsel cross-examined the witnesses called by the plaintiff who were his co-workers, vigorously, attempting as was his right to attack their credibility and reliability.

LIABILITY OF DANIELS & KENNEDY, IF ANY

Based upon this evidence, the Court now sitting both as judge and jury must make its own independent findings of fact. The Court finds that this accident occurred solely by reason of the carelessness and negligence of the plaintiff, a foreman and an experienced longshoreman. The evidence adduced by the ship, Inger, conclusively proves that there was no defect whatsoever in this jack. Portions of plaintiff's testimony tend to sustain this conclusion. It is difficult to believe that if this jack was defective plaintiff would not have called this to the attention of a member of the vessel's crew.

Intaglia, a witness for the plaintiff, testified that the jack seemed to slip because the plaintiff had "pulled it" (Tr. 223). Lucci, another member of the longshore gang, testified that he saw the clamps and they looked bent and rusted and the screw was bent and hard to turn, yet it is difficult to understand why he made no mention of this condition to the plaintiff. He testified further that he saw the plaintiff connect the beam to the jack but that plaintiff did not flip the lock that locks the jack in place when it is in the socket (Tr. 439).

Inger, in its brief, curiously enough now depends upon the evidence of these longshore witnesses as a basis for

recovery. Its contention is that a jury could conceivably find a verdict in favor of the plaintiff and the evidence would have justified such a verdict. It goes further and states in its brief that it does not think that any jury would have believed the ship's witnesses. In its brief before this Court, Inger states (p. 24):

> It requires no discussion to convince that upon that evidence the jury could have found "with reason" that the beam jack was patently defective, that the accident was caused by the defects, that such defects rendered the vessel unseaworthy, and that by reason thereof Inger was liable to plaintiff (Michalic v. Cleveland Tankers, 364 U.S. 325; Calabritto v. N.Y. & N.H.R.R. Co., 2 Cir., 287 F.2d 394, 395).

What the jury could have found is negated by the fact that the jury before Judge Bruchhausen did not find any condition of unseaworthiness nor did it find the ship negligent. This Court is mindful that it must make its own independent findings based upon the record, regardless of any of the jury's answers to the interrogatories propounded by Judge Bruchhausen.

The Court, therefore, makes the following findings of fact:

1. That there was no defect in the jack and thus no negligence on the part of the ship.

2. That the ship was not unseaworthy.

3. That the accident was caused by the plaintiff's sole negligence, evidenced by the fact that he used the beam jack on the top deck on the very day of the accident and made no complaint as to the manner in which it worked. This Court finds that the accident was caused by reason of the jack slipping because plaintiff "pulled it" after connecting the clamps to the beam and failed to "flip the

lock that locks the jack in place when it is in the socket." The Court also finds that the plaintiff did not tighten the clamps properly.

4. That Inger did not act within the limits of reason in compromising the plaintiff's claim.

The findings now made by this Court preclude any recovery by Inger over as against Daniels & Kennedy.

In *Puddu* v. *Royal Netherlands*, decided January 3, 1962, rehearing denied, February 20, 1962, the Court of Appeals for the Second Circuit affirmed the trial court. Four members of a stevedoring gang were injured while loading refrigerator cargo into a reefer hatch when one of the booms with which they were working buckled and broke. Puddu sued the defendant for negligence. An action instituted by another longshoreman was tried by Judge Conger and a jury. Puddu and a fellow longshoreman in a companion case stipulated that their case be tried by the same judge without a jury on the testimony adduced before the jury. The major issue before the jury was the cause of the buckling of a boom. Answering interrogatories propounded by the Court, the jury found that the boom was not defective and that the boom was caused to buckle by reason of the negligent conduct of the members of the stevedoring gang in failing to properly handle the ship's gear. Judge Conger in his unreported opinion (S.D.N.Y. Index No. Civ 151-46), in finding that there was no negligence on the part of the defendant and that the vessel was not unseaworthy, affirmatively stated that he followed the jury and adopted the findings which were found on the special questions given to the jury.

In *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 245, (C.A. 2d), decided December 15, 1961, a seaman was injured while chipping rust aboard a vessel. The plaintiff's evidence on the issue of liability consisted of his own deposition and the testimony of an expert witness. His version

of the accident was that he was not wearing goggles while chipping rust with a hammer on a particular portion of the vessel. He had none and had requested them from the boatswain, who kept them, before starting work but the boatswain claimed to have no more. He was unable to recall the name of the boatswain although he had been on the ship for almost a year. The defendant introduced the deposition of the vessel's chief officer, one Bodden, in which he testified that the deck crew, including the plaintiff, had each been given a pair of goggles and were informed that if the goggles should be lost or damaged, that it was their duty to report this in order for replacement by a new pair; that a notice was posted to this effect and that replacements were to be obtained from the chief officer; that he kept six pairs of spare goggles in his office and that it was the custom for the crew to come to him for supplies but that the plaintiff never sought replacement for his goggles. The chief officer also testified that on two previous occasions he saw the plaintiff chipping rust with goggles around the neck but not on the eyes and remonstrated with him, and that after the accident he asked the plaintiff whether he had worn his goggles and that the plaintiff answered "no," and when asked why, he did not reply. The trial court found for the defendant. The trial court found that goggles had been issued to plaintiff and that replacements were available. The Court of Appeals said (p. 216):

> Reading the findings together as we must, the last quoted finding means at least that the judge had determined, as he was amply warranted in doing, that goggles had been issued to plaintiff, that plaintiff had been instructed to come to the chief officer for a replacement if they were lost or damaged, and that replacements were available. It could mean also that the judge completely discredited plaintiff's story about the unsuccessful request to the anonymous boatswain.

or even that the judge thought plaintiff had the goggles with him but failed to put them on, as, according to Bodden, he had failed twice before. The judge would have been entitled to come to any of these conclusions although plaintiff was not before him, in view of the contradiction between plaintiff's and Bodden's versions of the goggle situation; see *Nolan v. Buffalo Ins. Co.*, 181 F. 2d 735, 738 (8 Cir., 1950). * * *

In *McAndrews v. United States Lines Co.* (S.D.N.Y., 1959 A.M.C. 1575, the Court said (p. 1579):

> However, if the ship-owner settles its action with the longshoreman and seeks indemnity over from others, it must in effect establish its own negligence or the unseaworthiness of its vessel as a prerequisite to a recovery over on its indemnity claim.
>
> Therefore, since in the case at bar United States Lines voluntarily settled with the plaintiff Joseph McAndrews, it must establish as a prerequisite to recovery against Chelsea the actionable facts showing the liability of United States Lines to plaintiff. *The Toledo* (2 Cir.), 1941 A.M.C. 1219, 122 F. (2d) 255; *Pennsylvania Railroad vs. McAllister Brothers, Inc.* (S.D.N.Y.), 1956 A.M.C. 707, 137 F. Supp. 788, affirmed (2 Cir.), 1957 A.M.C. 318, 240 F. (2d) 427; *Dunn vs. Cyalac Asphalt Paving Co.*, 175 N. Y. 214, 218 (1903). This burden has not been sustained by United States Lines as third party plaintiff against Chelsea.

In *Paliaga v. Luckenbach Steamship Co. v. Turner & Blanchard, Inc.* (C.A. 2d), decided March 22, 1962, the opinion reads as follows (pp. 1375-76):

> In cases in which the main action has been so settled, it is of course incumbent upon the court which enter-

tains the claim for indemnity to determine before requiring the stevedore to indemnify the shipowner whether it was reasonable for the shipowner to have entered into the settlement. *Chicago, R. I. & Pac. Ry. v. United States*, 220 F. 2d 939 (7 Cir. 1955); *see Lillebera v. Pacific Far East Line, Inc., supra.*

See also, *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U. S. 563; *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124.

Liability of Illinois Atlantic, if any

Regarding the liability of the charterer, if any, the precise situation in the case at bar was raised in *Drago v. A/S Ingrid*, 194 F. Supp. 398 (E.D.N.Y. 1961). With the exception of the plaintiff all the parties to the instant action were involved in *Drago*. Daniels & Kennedy was the stevedoring company, Illinois Atlantic the charterer, the Daily News the consignee of the paper shipped from Canada, and Illinois Atlantic's responsibility under an identical charter agreement was litigated.

The *Drago* case was tried in two parts: first, the issue of fact as between the injured plaintiff and the ship was tried and the jury found in favor of Drago because of the negligence of Ingrid. It found further that the plaintiff was guilty of contributory negligence to the extent of 75 per cent. After the resolution of the verdict, the Court explored the theory of warranty of workmanlike service between Daniels & Kennedy and the ship and between Illinois Atlantic and the ship.

The Court after due deliberation held that Illinois Atlantic was not liable to Ingrid under the terms of the charter agreement. This Court agrees with the conclusion reached by my colleague.

There is an important element of difference between the *Drago* case and the instant case. In *Drago*, the ship was

held 25 per cent negligent, whereas, in the instant case, there is a finding that the ship was in no wise negligent.

Particular attention might be called to the time charter in question, a standard form which has been widely used for years. The officers and members of the crew of the vessel remained in the employ of the owner, and the responsibility for the maintenance and upkeep of the vessel and her equipment remained in the hands of the vessel and her equipment remained in the hands of the owners. As stated in paragraph 26 of the charter at line 170:

> Nothing herein stated is to be construed as a demise of the vessel to the time charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters same as when trading for their own account.

In paragraph 1 of the time charter, at lines 37 and 38, it is stated that the owners shall "maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service."

Again, at paragraph 22 of the time charter, lines 140 and 141:

> Owners shall maintain the gear of the vessel as fitted, providing gear (for all derricks) capable of handling lifts up to three tons, also providing ropes, falls, slings and blocks.

Another case involving the same charterer and stevedore and the identical time charter was tried before another one of my colleagues in this Court in December, 1957, *Maccarone* v. *A. S. Inger* v. *Daniels & Kennedy, Inc.*, and *Illinois Atlantic Corp.* The plaintiff was injured as a result of a dangerous and defective condition of one of the ship's winches. Third-party complaints were served on Daniels & Kennedy and Illinois Atlantic seeking the same

type of indemnity as is presently before this Court in the instant case. At the close of the case Illinois moved for a directed verdict on the third-party complaint and the motion was granted. An appeal from the ruling that Inger had no right to indemnity from Illinois Atlantic was subsequently discontinued by Inger.

Inger raises the issue of the refusal of the third-party defendants to take over the defense of this action. After the refusal the attorney for Inger took the stand and testified before the jury as to the reasons that motivated him to compromise with the plaintiff. His testimony was to the effect that the jury might not have believed the witnesses he called and could well have predicated a verdict on the evidence of the plaintiff's witnesses. Counsel for Inger, by his testimony, shed doubt with respect to the veracity of his own witnesses and that alone might have effectively given credence to the evidence given by plaintiff's witnesses. Yet, in spite of his testimony the jury held the ship not negligent nor the ship unseaworthy.

The two third-party defendants at that point were put in the position of having but two alternatives, either agree to the compromise which would then make them liable for the settlement, or defend the main action. If they chose to defend and the jury found the ship liable, these same attorneys would then have the burden of convincing the jury that neither of the third party defendants was liable to the ship. On the one hand they would be defending the ship and on the other hand they would be defending themselves against the ship. This Court cannot see how counsel for the third-party defendants under these conditions could possibly assume this dual role.

With respect to the settlement itself, this Court believes it was inadvisable to compromise with the plaintiff. The believable evidence in the case at the moment of settlement was overwhelmingly in favor of the ship and in view of the testimony the settlement was unreasonable.

Opinion of Judge Abruzzo.

Exploring the evidence with respect to the settlement, it was made by the ship without the advice or consent of either of the third-party defendants. Of utmost pertinence, the record indicates there were many conferences between the attorney for Inger and the plaintiff's attorney while the trial was in progress. The attorneys for the two third-party defendants were not informed of these conferences, nor did they participate in any of them, nor were they invited to participate in any of them. Where three possible parties are vitally interested in the outcome of a litigation it is academic their advice and consent to any adjustment should be sought. Counsel for the third-party defendants were entitled to know exactly what the attorney for Inger was doing. While this does not affect the ultimate liability of the parties, it seems to this Court that parties who might ultimately have to bear the full burden of financial responsibility should be consulted constantly. The parties under these favorable conditions might well have adjusted all of their differences at the counsel table.

Regarding the legal fees and disbursements, point VI of Inger's main brief covers the subject in full with one paragraph which reads as follows (p. 37):

POINT VI

JUDGMENT SHOULD BE DIRECTED IN FAVOR OF INGER AGAINST BOTH DEFENDANTS FOR THE AMOUNT OF THE SETTLEMENT $30,000, TOGETHER WITH AN ALLOWANCE FOR REASONABLE COUNSEL FEES AND EXPENSES INCURRED IN THE DEFENSE OF PLAINTIFF'S CLAIM, WITH INTEREST.

If successful on the main issue, Inger's right to recover its reasonable counsel fees and expenses in defending against plaintiff's claim is not disputed, and, therefore, if the court finds in favor of Inger, a date

should be fixed for proof of such damages, as stated upon the trial (s.m.p. 172).

The converse of this, therefore, must be true. This Court has held that the two third-party defendants are not liable over to the ship, therefore, the ship may not recover legal fees or expenses.

CONCLUSIONS OF LAW

1. Inger is not entitled to recover against Daniels & Kennedy on its implied agreement of indemnity.

2. Inger is not entitled to be compensated by Illinois Atlantic as the time charterer.

3. A decree, therefore, must be entered in favor of Daniels & Kennedy and Illinois Atlantic Corp.

4. This opinion may be considered as the findings of fact and conclusions of law.

It is directed that a decree only be submitted to the Court within 10 days from the date of this decision.

MATTHEW T. ABRUZZO,
U. S. D. J.

Opinion by Judge Bruchhausen.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

PETER F. DAMANTI,
Plaintiff,
against
A/S INGER,
Defendant and
Third-Party Plaintiff,
against
DANIELS & KENNEDY, INC., and
ILLINOIS ATLANTIC CORP.,
Third-Party Defendants.

Civil No. 16435

June 27, 1957

Appearances:

PYNE, BRUSH, SMITH & MICHELSEN, Attorneys for Third-Party Plaintiff, Monroe J. Cahn, Esq., Joseph M. Brush, Esq., Of Counsel.

HAIGHT, GARDNER, POOR & HAVENS, Attorneys for Third-Party Defendant, Illinois Atlantic Corp., David P. H. Watson, Esq., Of Counsel.

CHARLES G. TIERNEY, Esq., Attorney for Third-Party Defendant, Daniels & Kennedy, Inc.

BRUCHHAUSEN, D. J.

Defendant and third-party plaintiff, A/S Inger, the shipowner, moves for various forms of relief under Rules

50, 49, 58 and 59 of the Federal Rules of Civil Procedure.

Immediately prior to the time for making summations to the jury in the original action herein, the shipowner settled with the plaintiff stevedore, after inviting impleaded third-party defendants, Illinois Atlantic Corporation, the time charterer and Daniels & Kennedy, Inc., the stevedore, to take over the shipowner's defense.

Additional testimony was given by the shipowner's attorney as to the reason for the settlement of the plaintiff's action. Thereupon the causes of action for indemnity were submitted to the jury upon special interrogatories, a copy of which, with the answers, is annexed.

The cases hold that settlement with a plaintiff does not preclude recovery by the settling indemnitee, who is a passive wrongdoer, against a primarily liable indemnitor. Chicago, Rock Island & Pacific Ry. Co. v. United States, 7 Cir., 220 F. 2d 939; Chicago, Rock Island & Pacific Ry. Co. v. Dobry Flour Mills, 10 Cir., 211 F. 2d 785; Garrity v. Bartolomeo, 2 Cir., 149 F. 2d 604; Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214; Cf. American President Lines v. Marine Terminals Corp., 9 Cir., 234 F. 2d 753; Cf. Newport News Shipbuilding & Drydock Co. v. United States, 4 Cir., 226 F. 2d 137; Cf. also, Cardinal v. State, 304 N. Y. 400.

It has been held that a party undertaking to settle a claim must prove that he was liable, that the settlement was reasonable, and that he and the party from whom he seeks indemnity were not joint tort feasors in pari delicto, but that his negligence was passive and secondary, while that of the party from whom indemnity is claimed was primary, active and affirmative. The Toledo, 2 Cir., 122 F. 2d 255; Donald v. Guy, D. C. Va., 127 Fed. 228.

However, there is a distinction between liability in law and liability in fact. The litigant who could correctly determine the latter, whether or not the trial be before a jury, would be clairvoyant.

Opinion by Judge Bruchhausen.

It seems unlikely that the same degree of liability in fact on the part of the indemnitee must be established as would have been established by the plaintiff against the said indemnitee, for the law favors settlements, and if such original liability had to be so clear cut, settlements could rarely, if ever, be made. The result would be that only jury verdicts would establish the right to indemnity, and indemnitors, if they were advised of the original lawsuit and given a reasonable opportunity to defend, would be bound by the findings implicit in the original judgment, i.e., liability and damages. Standard Oil Co. v. Robbins Dry Dock & Repair Co., 2 Cir., 32 F. 2d 182; New York & Porto Rico S. S. Co. of New York v. Lee's Lighters, E.D.N.Y., 48 F. 2d 372; Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d 784.

As pointed out in Whitmarsh v. Durastone Co., D.C.R.I., 122 F. Supp. 806, 810:

> "The voluntary payment or submission to judgment by a person who thereafter seeks indemnity from the actual wrongdoer does not defeat his right to recovery. It merely varies the degree of proof required to establish the liability of the person from whom such indemnity is sought."

In Fein v. Bonetti, 111 N.Y.S. 2d 840, affirmed 282 App. Div. 868, 125 N.Y.S. 2d 1; reversed on other grounds 307 N. Y. 682, an effort was made by the indemnitor to bind the indemnitee by the testimony against it of the plaintiff in the original action. In its decision, the trial Court said, 111 N.Y.S. 2d 840, 844:

> "Certainly the judgment against plaintiff after the first trial does not preclude the claim here, it not being clear as to just upon what elements the verdict for Mrs. Fein was found."

In Chicago, Rock Island & Pacific Ry. Co. v. United States, 220 F. 2d 939, something of a similar nature arose. The trial Court found that both the original claimant and the indemnitee-plaintiff were "in the exercise of due care and caution in their behalf." The Court rejected the argument that such absence of liability on the indemnitee's part precluded recovery in the indemnity action by the following language, placing such a finding in its proper perspective, at page 941:

> "It does not follow from the finding here that the plaintiff and its employee 'were in the exercise of due care and caution in their behalf' that a similar finding would have been made by the triers of fact in an action by the employee against the plaintiff. Plaintiff at the time it made settlement with the employee did not have the benefit of such a finding. It was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employers' Liability Act, it cannot be said that plaintiff made other than a fair and reasonable settlement of its potential liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances."

The rule as to the finality of the adjudication of the original claim is clearly stated in Crawford v. Pope & Talbot, Inc., supra, at page 795:

> "If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not

given reasonable notice of the action and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action. Where, on the other hand, the indemnitee and the indemnitor are co-defendants actively participating in the defense of the original action, or where the indemnitor, with notice of the action and of the indemnitee's request that he defend it, does not participate in the defense but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them both indemnitor and indemnitee are bound by the findings necessary to the judgment in the action."

Perhaps it would not be accurate to substitute the word "settlement" for "judgment" in the above quoted paragraph, but at the same time it would seem improper to go to the other extreme and say that the settling indemnitee, before he could recover, must place himself in the original claimant's shoes and prove claimant's case against himself to the same degree and with the same vigor as would have been incumbent upon the original claimant. The result would be that settlements would be fewer and indemnity claims larger.

Perhaps there may be a distinction between the readiness with which an indemnitee may settle when the basis of his indemnity claim is upon an express agreement to indemnify, Chicago, Rock Island & Pacific Ry. Co. v. Dobry Flour Mills, supra, or upon an agreement to indemnify, implied in fact, Ryan Co. v. Pan-Atlantic Corp., 350 U. S. 124, as opposed to a quasi-contractual agreement to indemnify, referred to as an agreement implied in law, Chicago, Rock Island & Pacific Ry. Co. v. United States, supra.

In the first two instances the indemnitor has taken it upon himself either by express verbiage, or verbiage reasonably to be implied from express verbiage, that he will

stand behind any loss that the indemnitee has suffered. In the latter instance the agreement to indemnify is imposed by law, upon the indemnitor, irrespective of, and often in violation of, his intention. Gallant v. Waterman S. S. Corp., S.D.N.Y., 90 F. Supp. 495. Cf. Hill v. Waxberg, 9 Cir., 237 F. 2d 936, for the distinction between contracts implied in fact and contracts implied in law.

The impleaded defendants in this action left the shipowner indemnitee with almost the whole burden of defeating the original claim. It was the shipowner who attempted to prove claimant's contributory liability, exaggeration of injuries, and absence of any breach of duty to the said claimant, so that if the $30,000 paid in settlement of the case was less than what a jury would have awarded, the shipowner alone deserves the credit.

If the impleaded indemnitors made vigorous objection to settlement with the claimant, it was not in complete keeping with any vigorous effort to defeat the claim originally.

If there is such a distinction between voluntary settlement of a claim when indemnity is based upon contract as opposed to quasi contract, it may lie in the fact that an action based upon quasi contract is practically, if not in fact, a tort. Chicago, Rock Island & Pacific Ry. Co. v. United States, supra; Gallant v. Waterman S. S. Corporation, supra; C. F. Harms Co. v. Erie R. Co., 2 Cir., 167 F. 2d 562; Compare Brown & Root, Inc. v. United States, D.C.S.D. Texas, 92 F. Supp. 257, affirmed 5 Cir., 198 F. 2d 138, wherein such an action was referred to as "ex contracto."

In the answers to the interrogatories the jury did not exactly demonstrate that it was guided by principle. It first decided that $30,000 was a reasonable compromise, and then had to leave the second interrogatory as to whether it was plainly erroneous, if not a reasonable compromise, unanswered. The jury then determined that

$30,000 was not plainly erroneous as to amount (after failing to answer interrogatory #2 which should have preceded this answer by an affirmative response) but plainly erroneous as to liability. If the absence of liability was so plain, then why should payment have been made in the first place? The jury did not require instruction on this subject. The jury, after due deliberation, concluded that there was absolutely no liability on the shipowner's part, and still it thought that $30,000 was a reasonable payment for the shipowner to make to one to whom it owed no liability. The jury could conceivably have awarded a substantial sum of money on the original claim, if that had been left for its determination, rather than by the settlement negotiated by the parties, especially after the original plaintiff's attorney had made his summation. A jury that considers $30,000 as "nuisance value" favored the plaintiff.

Undoubtedly the shipowner's counsel, apparently a lawyer of long and substantial experience sensed this, from the demeanor and reaction of the jurors. Yet it is most unlikely that such a jury verdict could have been set aside or reversed. Cf. Ondato v. Standard Oil Co., 210 F. 2d 233; Dickerson v. Long Island R. Co. 266 App. Div. 852, 42 N.Y.S. 2d 335, motion for leave to appeal denied 266 App. Div. 921, 44 N.Y.S. 2d 344.

Shortly before completing its deliberations, the jury, as to the indemnity claim, inquired as to whether interrogatory B 4 referred to unseaworthiness on the morning of the accident or at the time of the accident. Thereupon both questions were submitted to the jury and the answers were in the negative. While this is not conclusive as to the jurors lack of due consideration, it is an indication of such when added to other inconsistencies.

Another matter should be noted. In question B 3 the jurors were asked as to the nature of the stevedoring con-

tractor's negligence, and they responded by the word "carelessness", which is not particularly enlightening.

The jurors should not be charged with the problems which may have arisen in framing the interrogatories. The Court, in its discretion, prepared them. Skidmore v. Baltimore & O. R. Co., 2 Cir., 167 F. 2d 54. The attorneys, while approving a special verdict, were not in agreement in its preparation. They might have been more helpful if they had acquiesced, as appears to be the object of Rule 48. Perhaps, under subdivision (b) of Rule 48 the jury could have been instructed to clarify the verdict, thus obviating the present difficulties. Yet when the jury submitted its answers, both sides seemed to claim victory, and further deliberation was not requested.

Furthermore, the general law on the subject, as well as the law applicable to this case, is complex and the jury could readily have been confused.

The shipowner based its indemnity claim against the time charterer upon the contractual basis of certain provisions in the time charter. The time charterer used other provisions for its benefit against the shipowner. The instrument itself is long and complex. If the time charter and the facts of the accident were similar to those in The Lewis Luckenbach, 2 Cir., 207 Fed. 66, the liability might be decided one way; if dissimilar, perhaps another. Counsel themselves admitted the paucity of law on this point. On a new trial, they may be in a position to present the matter more clearly and thoroughly.

The time charter also contains certain provisions as to the status of the ship's captain. The case of Logue Stevedoring Corp. v. The Dalzellance, 2 Cir., 198 F. 2d 369, may have some bearing upon ultimate liability under the time charter in that regard.

The time charterer urges that it bears no responsibility to the stevedoring contractor, claiming that the latter was

an independent contractor. Yet power to control the manner of performance of the work may produce responsibility. Gallagher v. United States Lines Co., 2 Cir., 206 F. 2d 177. This might be a question for the jury.

In Newport News Shipbuilding & Drydock Co. v. United States, 4 Cir., 226 F. 2d 137, the Court differentiated between the commercial guarantees of workmanship and materials and the tort guarantees against liability in a certain ship repair contract. Perhaps an analysis of the provisions of the time charter from these aspects on retrial would help.

A clear and thorough presentation of the matters above referred to, on re-trial, will aid both the Court and jury in their determinations.

The shipowner also claims contractual indemnity from the stevedoring contractor claiming that it is an intended beneficiary of certain provisions of a stevedoring contract with the consignee of the freight.

Such a contention would seem to be more logically made by the time charterer rather than the shipowner who was more in privity with the affreightment, but on retrial this issue could be developed more clearly. Cf. Tozar v. Phillips Corporation, D.C.E.D. Pa., 130 F. Supp. 554, affirmed on opinion below, 3 Cir., 226 F. 2d 959.

Finally, the shipowner claims common law indemnity of status, or indemnity implied in law, or quasi-contractual indemnity against the stevedoring contractor. If the United States Supreme Court extends its holding in Ryan Co. v. Pan Atlantic Corp., supra, and agrees with the well established law of New York, Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 173; McFall v. Compagnie Maritime Belge, 304 N. Y. 314; Cf. also, Rich v. United States, 2 Cir., 177 F. 2d 688, and permits such common law indemnity despite workmen's compensation insurance, allowing the legislature to rectify any

inconsistencies (as the New York State legislature has done this year), then, depending on the jury's finding of the facts, the stevedoring contractor may be found liable. On retrial, a clearer development of what the law on this point is, or ought to be, would help the Court considerably, and help it to clarify matters or remove the subject from the jury, once it has determined what such law is.

The shipowner has moved for various forms of relief, but in essence, it asks the Court to accept that which favors it and reject the unfavorable. A just determination cannot well be arrived at without a retrial of the entire indemnity issue.

In advance of the new trial, the attorneys for the parties involved should make every effort to stipulate facts and to agree upon matters of law.

The motion for a new trial is granted. Settle order on five days notice.

WALTER BRUCHHAUSEN,
U.S.D.J.

Opinion by Judge Brachhausen.

SPECIAL VERDICT

(A)—SETTLEMENT WITH PLAINTIFF

1. Was the payment by the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes

2. If no, was the payment plainly erroneous? (not answered)

3. If yes, was it plainly erroneous as to amount? No As to liability? Yes

4. Is it possible that you would have found the shipowner liable?

For negligence? No For seaworthiness? No

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered) For negligence? For unseaworthiness?

(B) INDEMNITY CLAIM

1. Were the agents, servants or employees of the stevedoring contractor negligent or careless in any way? Yes

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes

3. If yes, what was the nature of such negligence? Carelessness

Opinion by Judge Brychtausen.

4. (a) Was the ship or its equipment unseaworthy at 8:30 o'clock a.m. on October 27, 1955? No

(b) Was the ship or its equipment unseaworthy at the time of the accident? No

5. Was the ship owner negligent? No

6. If yes, what did that negligence consist of? (not answered)